FILE COPY. 11825

Office Supreme Court U. S.
FILED
JAN 19 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY, *Appellant.*

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY BRIEF ON BEHALF OF APPELLANT.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
WILLIAM F. SHEEHAN,
Of counsel for appellant.

Washington, January 19, 1904.

[18,672.]

[18,672.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 132.

THE PEOPLE'S GAS LIGHT AND COKE COMPANY,
Appellant,

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY BRIEF ON BEHALF OF APPELLANT.

I.

The brief filed on behalf of defendant renews, as was anticipated, the argument based on the supposed prescience of the legislature in 1865, and on the fact that conditions have changed since the passage of the act. A similar contention was discussed by this court in the case of *The Citizens' Bank of Louisiana* v. *Parker*, decided January 4, 1904, and the language of Mr. Justice McKenna, in delivering the opinion of the court, is most apposite to the charter of the People's Company now under discussion, viz.:

> "It [the bank] was created to accomplish purposes in which the state took an interest, and the expectations which were entertained of it may be regarded in the interpretation of its charter. With the wisdom or folly of the charter we have nothing to do. Our sole function is to interpret it. It may seem, in 1903, to have been imprudent legislation. But how did it appear in 1833 and 1836? We must contemplate it as of that time. States act

> through men, and, of course, cannot have a greater appreciation or prophecy of things than men. Events may disappoint or baffle their purposes, but they cannot for that reason be relieved from their obligations. Nor can they necessarily be accused of folly. There are limits to the power of government and the wisest provisions may be frustrated or turned to detriment by causes which no prescience can foresee. It is, therefore, to 1833 and 1836 we must turn, to the conditions and purposes of then. . . . Capital was necessary . . . The scheme was large and hazardous. Private capital had to be tempted to it, and the state, besides contributing its credit, offered the inducement of a relief from burdens."

It is, moreover, now admitted that the rate of three dollars per thousand cubic feet of gas was fair and reasonable in 1865 when the contract was entered into, and that it has become unreasonable only by reason of subsequent events. Upon this point, the following statements are made in appellee's brief (pp. 13, 18, 67):

> "And the court will note the conditions which made the price of three dollars reasonable in February, 1865, when two dollars and two 50/100 dollars was reasonable ten years earlier. It was because of the war of the rebellion still pending—the debased currency of that day—the legal tender dollar being worth forty cents only, and the high war prices" (p. 13).
>
> "The court will not so construe the act that evil intentions can be charged against the legislature of that day.
>
> "It will construe the act as a legislative expression that in 1865 three dollars was a reasonable rate for gas, and that under all due conditions such rate would be reasonable for ten years. No other interpretation, it is submitted, could be put upon the section, without imputing evil motives" (p. 18).
>
> "In the early days, so small was the patronage

> of public service corporations and so costly all methods of manufacture and transportation, that new communities, especially in the west, were willing to make all sorts of concessions to secure the establishment and operation of these public utilities in their midst" (p. 67).

The question, therefore, is whether or not a contract, concededly fair and reasonable when entered into and of which the state and city have had the full benefit, is now to be nullified or disregarded and its legal effect and import subverted simply because of changed conditions.

II.

The appellant's brief heretofore filed fully meets the contention of the appellee in regard to the effect of the merger or consolidation under the act of 1897, and shows that no new corporation resulted or could result therefrom, and that the privileges and immunities which are suspended by section 9 of the act are those of the companies disposing of their property by sale, lease or merger, and not the privileges and immunities of the acquiring or merging corporation. It is clear that the legislature intended to leave untouched the privileges and immunities of the latter.

The evident intent of the act of 1897 was, as the Supreme Court of Illinois has declared, that no new corporation should result from the consolidation or merger. There is nothing in the act transferring to the acquiring or merging company any corporate power, franchise, privilege or immunity whatever of the companies selling, leasing, or disposing of their property. On the contrary, their separate powers, privileges and immuni-

ties are expressly suspended and can never be exercised except "so far as, and for such time as, the protection of such creditors or mortgagees may require" (sec. 9), that is, the existing separate creditors or mortgagees of the transferring or merged corporations. The intention of the legislature clearly was that the property of the transferring or merged corporations should be thereafter held and their business thereafter conducted under the charter rights and powers of the acquiring or merging company, and that the duty of the latter to supply gas should depend upon and be governed and measured by its charter (*People ex rel. Deneen* v. *People's Gas Light & Coke Co.*, pamphlet, pp. 52, 62; *People's Gas Light & Coke Co.* v. *Hale*, 94 Ill. App. 406, 421). Had the corporate powers, rights and privileges of the merged companies been kept alive to be exercised by the merging company, it might then have been argued that the property of any such merged company "was to be holden in the same manner and subject to the same rights as before." Not having so declared, it cannot be presumed that such was the intent. In *Tomlinson* v. *Branch*, 15 Wall. 460, 465, the direct converse was involved. In that case and in other analogous cases involving the consolidation of railroads, where no *new* corporation was created, the court was governed entirely by the intent of the legislature deduced from the fact that the existing rights, powers and privileges of the *merged* companies should be kept alive and follow the properties transferred, and that such properties should be holden and enjoyed under them and subject to the same liabilities. *Central Railroad, etc., Co.* v.

Georgia, 92 U. S. 665, 675, and cases there discussed. The language used in the act of 1897, however, shows that it was intended that the property acquired by any sale, lease or merger should be thereafter held, enjoyed and operated under the charter of the acquiring or merging company.

Moreover, even when it is clear that the legislature intends to preserve the existing several corporate rights, powers and privileges of the transferring or merged companies, and to continue their several enjoyment "in the portions of the road which had previously belonged to them," the result is not the loss of any existing immunity or exemption, however much any "diversity may sometimes raise questions of some embarrassment." (Mr. Justice Bradley in *Branch* v. *City of Charleston*, 92 U. S. 677, 682.) So, in *Tomlinson* v. *Branch*, *supra*, 15 Wall. at p. 470, partial relief was given, because it appeared that the legislature intended to keep alive the separate rights and privileges of the constituent or merged corporations. Had the legislature, in that and other analogous cases where no new corporation was created, indicated its intention that the corporate rights and powers of the transferring corporations should not pass to the acquiring corporation but should be suspended, it cannot be doubted that the court would have held that the rights, powers, privileges and immunities of the *acquiring* or *merging* corporation should be the measure of its rights, duties, obligations and liabilities in respect of all its property.

The controversy is in fact narrowed to the fundamental inquiry, where does the city council ob-

tain the power to regulate gas rates? It is claimed, on the one hand, that this power is derived from section 3 of the act of 1865, and, on the other hand, that it is to be inferred from a part of subdivision thirteenth of article V of the City and Village Act of 1872. Yet, the two provisions relied on by the city are shown by the appellee's own argument to be doubtful. Thus, we have both claims on behalf of the city based upon statutory provisions which, according to its own contention, are doubtful and ambiguous. In such a case, as has been repeatedly declared, it is the well settled doctrine of this court as well as of the Supreme Court of Illinois and of the courts everywhere, so far as we have been able to ascertain, that doubt and ambiguity are to be resolved against the existence of power in the *municipality* (principal brief, pp. 63, 71).

The cases which hold that a statute or contract in limitation of the right of the *legislature* or of a duly authorized municipality to regulate or tax should be strictly construed in favor of the *public* (*e. g.*, the recent case of *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 371), are not at all in point. No one challenges the doctrine of strict construction in such cases. But this does not in the remotest degree tend to establish the proposition that municipal corporations, mere creatures of the legislature, may exert a particular power without express delegation of it. As Mr. Justice Harlan said at this term in *Atkin* v. *State of Kansas*, 191 U. S. 207, 220, "such municipal corporations exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted." More-

over, the very doctrine of strict construction which the appellee would apply to the charter of the People's Company, obtains equally with regard to any legislative grant of power to the city council, whether under section 3 of the act of 1865 or the provisions of the City and Village Act of 1872.

In view of the contention on behalf of the city of Chicago that the power of its city council to regulate the charges of the People's Company is derived from section 3 of the amendatory act of 1865, and in view of its insistence that the provisions of this section do not extend to the properties of the ten gas companies merged into the People's Company, the inquiry must at once suggest itself to the court, by what right can the city claim that under section 3 of the amendatory act it may in any aspect regulate the price of gas furnished from the plants or through the pipes and mains of such other gas companies? If the charter does not extend to properties which were acquired from other companies, how can it be consistently claimed that the city may regulate the price of gas furnished by means of the properties of those companies? Can it be argued in one breath that the city derives its power from section 3 to regulate all the charges of the People's Company whether in respect of its own original property or in respect of the property of the other companies, and in another breath urge that the limitation contained in the very same section may, nevertheless, be disregarded and nullified as to such other companies? If the city contends that section 3 applies to all gas supplied by the People's Company, it practically admits that the only question before the court is

whether section 3 of the act of 1865 was or was not intended by the legislature to delegate *unlimited* power to the city council of Chicago with respect to the People's Company or properties acquired by it. On that point, it is submitted, the language of section 3 is altogether too plain to admit of reasonable doubt. There is no process of construction by which the proviso or qualifying clause of section 3 can be severed from its collocation and practically nullified.

Of course, the argument that section 3 is now inconvenient or embarrassing because of the provisions of the subsequent constitution of 1870, is entitled to no weight. Contracts cannot be qualified or undermined by subsequent constitutions any more than by subsequent statutes. As Mr. Justice Harlan said in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672:

> "A state can no more impair the obligation of a contract by her organic law than by legislative enactment; for, her constitution is a law within the meaning of the contract clause of the National Constitution. *Railroad Co.* v. *McClure*, 10 Wall. 511; *Ohio Life Ins. & T. Co.* v. *Debolt*, 16 How. 416, 429; Sedgwick's Stat. & Const. Law, 637."

But there is, in truth, no real practical inconvenience or embarrassment in the fact that the legislature instead of a local body must regulate the charges of gas companies. Such was the universal practice in 1865, and such is the practice to-day in a large majority of the states.

III.

In serving appellee with its brief, the People's Company asserted, as it has repeatedly asserted (principal

brief, p. 84), that in every state in which such a question had arisen as that involved in the case at bar, namely, as to the power of a city council to regulate the price to be charged by a private corporation for gas, water, telephones, etc., the decisions had been uniform that such a power could only exist when granted in express language; and appellee has not cited a single authority of a court in any jurisdiction questioning or challenging the soundness of that proposition.

Nor is a single case cited questioning the proposition that where consolidation has been authorized and the statute clearly provides that no new corporation shall be created thereby but that the transferring corporations shall be merged into "one of said merging and consolidating corporations," the rights, privileges, franchises and immunities of the acquiring company are not preserved to the fullest extent. In every case where an acquiring company retained its original charter (*e. g.*, *Central Railroad Co.* v. *Georgia*, 92 U. S. 665, and *Tomlinson* v. *Branch*, 15 Wall. 460), it has been held that the question of the extension of its charter to the acquired property depends upon the intention of the legislature.

In the case at bar, as the Supreme Court of Illinois has declared, no new corporation was intended to be created; it is the People's Company which is furnishing the gas covered by this ordinance; its charter extends throughout the whole city; the ordinance under which it opens the streets and lays its pipes covers the whole city, and it is to its charter and this ordinance that we must refer for the measure of its rights and duties. The legislature contemplated existing conditions; it was

familiar with its own enactments; it knew of this clause in the charter of the People's Company, and, for the purpose of itself regulating the subject, it distinctly provided in section 11 of the act of 1897 that the acquiring company should not increase its rates above those to which competition had reduced them. If the present rate of one dollar per thousand cubic feet is unreasonable, the legislature may reduce it. And, to repeat, there is no practical difficulty in this, for, as is well known, the regulation of rates has until recently always been retained and exercised by the legislature.

IV.

Some of the statements in the brief filed on behalf of the appellee are erroneous, undoubtedly through inadvertence. The contentions of the appellant and its alleged concessions are stated in language quite at variance with the facts and the brief filed on its behalf. The court will, of course, look to the appellant's brief and argument for the contentions and concessions which it makes. But inaccuracy or carelessness in stating an adversary's argument unfortunately tends to increase the labors of the court.

Thus, at page 9, the statement is made that appellant concedes that its "contract is lost when the company takes advantage of the act of 1897, and sets up that a new contract is created by section 11 of that act, which makes a new rate, perpetually, for $1.00." It is only necessary to remark that no such concession is made.

Again, it is stated that the appellant is seeking to "force upon a community a fixed high price, where it

was enjoying a low price by original ordinance, or a regulated price" (p. 78), and that "to hold that under the act of 1897, a high-price corporation could swallow up low-limit corporations and thereby impose its high rates in the low-rate territory would be to encourage fraud and corporate greed throughout the land" (p. 92). Yet, these statements are made in the face of the distinct and indisputable fact that in no single instance was there an ordinance as low in respect of private consumers as the dollar-rate of the People's Company, that there was no lower-rate territory than that in which the dollar-rate was charged by the People's Company, and that there is nothing before the court which in the slightest degree warrants any such statements.

It is further stated on page 42 of appellee's brief that "by the provisions of that act [*i. e.*, the Consolidation Act of 1897], the merging or consolidating companies come under the general law." A perusal of the act of 1897 will show that there is no such provision. This argument is for the obvious purpose of drawing the People's Company under the provision of section 9 of the General Incorporation Act of April 18, 1872, which reserves to the *legislature* power to prescribe regulations (Laws of 1871–1872, pp. 296, 299, 300).[1] Yet, it is the settled law of the Supreme Court of Illinois that the General Incorporation Act does not affect the charters of corporations organized under special acts. *Union Ins. Co.* v. *Frear*

[1] The statement of the appellee as to this General Incorporation Act entirely disregards a similar general act passed February 18, 1857 (Laws of 1857, p. 161).

Stone Mfg. Co., 97 Illinois, 537, 545; *Wincock* v. *Turpin*, 96 Illinois, 135, 144.

By this remarkable process of reasoning, the People's Company, in the face of the indisputable fact that it was organized by special act, is transformed into a "company heretofore [*i. e.*, prior to 1872] organized under the *general laws* of this state," and is thus to be made subject to the regulations provided for in subdivision thirteenth of article V of the City and Village Act of 1872 (Laws of 1871–1872, p. 228). Then, the last clause of subdivision thirteenth is severed from its position and purpose as a proviso and transformed into a distinct and independent clause, so as to relate to a different subject, and the court is told that (appellee's brief, p. 38)—

> "It should have been a separate clause, and we will call it *sub-thirteenth*."

All this shifting of clauses is for the purpose of establishing that, if the People's Company had been organized under the general laws of the state of Illinois, it could have erected gas factories and laid down pipes in the streets or alleys of the city only "subject to such regulations as any such city or village may by ordinance impose." As if this would advance the argument at all or tend to establish that the legislature had delegated to the city council of Chicago the power to regulate the price of gas! See *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 471, and cases cited in principal brief, pp. 76 *et seq.*

The argument of the city of Chicago, based on such premises, comes to this, that the provision "subject to such regulations," etc., which obviously qualifies and

relates solely to the city's consent "to erect gas factories and lay down pipes," is to be construed apart from its collocation and is to be given effect as relating to "something different from the power given by clause thirteenth,"[1] in which it is found; or, stated in different language, the words are to be taken out of their place and sentence and separated entirely from the language and matter they qualify in order to make "still another clause," conferring different and broader substantive powers of regulation. Surely, it will require no further comment to refute such an extraordinary proposition, from which the court is solemnly told there is no escape.

V.

The appellee states (brief, p. 40) that the language of section 9 of the General Incorporation Act of 1872[2] (Laws of 1871–1872, p. 299) was construed by this court and the Supreme Court of Illinois in the *Water* cases (180 U. S. 587, 619, 624, affirming 186 Illinois, 179; 186 Illinois, 326; 178 Illinois, 571) to include a reservation of the right to fix water rates. In the *Rogers Park* case, 178 Illinois, 571, 180 U. S. 624, the section cited was not even referred to. While, in the other cases, this section was discussed by the courts, *because the water companies had in fact been organized under the General Incorporation Act of 1872 and not by special*

[1] Appellee's brief, p. 39.

[2] This section 9, however, relates solely to powers reserved to the *legislature* itself, and hence does not bear in any way upon the question whether or not the *legislature* has in fact ever delegated the power to city councils.

charters, nevertheless the decision in those cases, as well as in the *Rogers Park* case, clearly turned upon the construction to be given to section 1 of article X of the City and Village Act (pamphlet, p. 18) in determining whether the municipalities concerned had been empowered to bind themselves by an irrevocable contract not to regulate water rates. That section, which is set out in the *Freeport* case, 180 U. S. 587, at page 593, and the *Rogers Park* case, 180 U. S. 624, at page 628, gave authority to municipalities "to authorize any person or private corporation to construct and maintain the same [waterworks] at such rates as may be fixed by ordinance and for a period not exceeding thirty years." It was held that the decision of the Supreme Court of Illinois in the *Danville* case, 178 Illinois, 299, 309–312, construing this section to mean that the construction and maintenance of waterworks thereunder could only be "at such rates as may be fixed by ordinance" from time to time and not once for all during thirty years, should be followed, because the question was "balanced with doubt." 180 U. S. 596, 623, 628.

The decisions in the *Water* cases in the Supreme Court of Illinois (178 Illinois, 571; 180 Illinois, 235; 186 Illinois, 179; 186 Illinois, 326) are all based on the decisions in the *Rogers Park* case and the *Danville* case, 178 Illinois, 299, and the denial in those cases of municipal authority to make an irrevocable contract to fix water rates was followed by this court in the *Freeport* case, which in turn controlled the decisions in the others.

VI.

The case of *Harrison* v. *The People*, 195 Illinois, 466, 473, is cited by opposing counsel (brief, p. 63) as being contrary to the rule that, in certain cases, great weight is to be accorded to contemporary interpretation by an administrative department. But that case has no such effect. Contemporary interpretation is to be resorted to only in cases of doubt, and, in the case cited, it was simply held that a contemporary interpretation which would result in great inconveniences and absurd consequences would not be allowed to control the court in the construction of the terms of a municipal ordinance not really susceptible of a reasonable doubt. In the appeal at bar, the practical contemporaneous and long continued interpretation of the law department of the city of Chicago is relied on because the interpretation of the City and Village Act of 1872 is said by the city itself to be doubtful. As is well settled, "the rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt." (Mr. Justice Matthews in *Swift Co.* v. *United States*, 105 U. S. 691, 695. See also *Fairbank* v. *United States*, 181 U. S. 283, 310.) In the recent case of *United States* v. *Sweet*, 189 U. S. 471, 473, Mr. Justice Holmes, delivering the opinion of the court, among other things said:

> "The weight of a contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Finnell*, 185 U. S. 236, 244."

VII.

There is no inconsistency between the statement that the legislature by the act of 1897 actually regulated the price to be charged by the purchasing, leasing or consolidating company, and the statement that if the city had contracted for lower rates than those prescribed by section 11 of the act of 1897 in any ordinance granting to a particular gas company the right to lay down pipes, such contract might have to be observed by the purchasing, leasing or consolidating company as an "obligation now resting" upon it. The statement is made *arguendo* by way of anticipation, because in section 23 of article IV of the constitution of Illinois, it is provided that "The General Assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this state, or to any municipal corporation therein." If there had been such an existing contract—and so far as appears no such existing contract has been violated by the People's Company—then in a proper proceeding at the suit of the city to enjoin *pro tanto* the sale, lease or consolidation, its rights would have been adjudicated. No such question is presented in the case at bar, and even if the contract rights of the city had been impaired, the remedy would not be in passing an ordinance regulating the price of gas. It could not take the law into its own hands, and attempt to regulate rates because some contract had been impaired by virtue of an act of the legislature. If any such question could seriously have been urged in 1897 against the consolidation, there can be no doubt that

it would have been held that the right to regulate the price of gas or water, even if reserved in an ordinance granting consent to open the streets, was such a governmental matter as to be always within the power of the legislature to alter or limit as it saw fit, and that consequently section 11 of the act of 1897 securing uniformity and the low price of one dollar per thousand cubic feet throughout the whole city was not in conflict with the provision above quoted from the Illinois constitution. *Atkin* v. *State of Kansas*, 191 U. S. 207, 220; *Covington* v. *Kentucky*, 173 U. S. 231, 240; *New Orleans* v. *N. O. Waterworks Co.*, 142 U. S. 79, 89.

Conclusion.

The brief filed on behalf of the city of Chicago also indulges in a kind of argument which it is difficult to notice with due patience. The court is told that when the act of 1865 was passed undoubtedly "hot" discussions took place (p. 16); that "the gas company's agents evidently prevailed on the legislature" to do this or that thing (p. 16); that "the gas company's people got the best of" a legislator (p. 17); that "appellant must admit that the talented agents of the gas company took the legislature into confidential relations and whispered into their willing ears certain corporate secrets" (pp. 75-~~66~~); that "the legislature could in no other way be aware of the plans and schemes of the gas magnates" (p. 76), etc. This form of dialectics is becoming altogether too frequent, and is, perhaps, the result of irreflection. We shall not venture to criticise or comment upon such statements. In

themselves they sufficiently indicate the full measure of regret which all must feel that any member of this bar should have seen fit to print and file in this court a brief containing them. An argument of this character—

> "Though it make the unskilful laugh, cannot but make the judicious grieve."

Washington, January 19, 1904.

WILLIAM D. GUTHRIE,
JAMES F. MEAGHER,
WILLIAM F. SHEEHAN,
Of counsel for appellant, People's Company.

11835

FILE COPY.

11836

Office Supreme Court U. S.
FILED
JAN 28 1904
JAMES H. McKENNEY,
Clerk.

132

CIRCUIT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF ILLINOIS—NORTHERN DIVISION.

IN EQUITY.

DARIUS O. MILLS,

Complainant,

vs.

THE CITY OF CHICAGO AND THE PEOPLE'S GAS LIGHT AND COKE COMPANY,

Defendants.

OPINION OF CIRCUIT JUDGE GROSSCUP OVERRULING DEMURRER OF THE CITY OF CHICAGO AND GRANTING AN INJUNCTION AGAINST THE ENFORCEMENT OF THE ORDINANCE AS PRAYED FOR IN THE BILL.

(Filed January 25, 1904.)

IN THE UNITED STATES CIRCUIT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS.

In Equity.

DARIUS O. MILLS,

Complainant,

vs.

THE CITY OF CHICAGO and THE PEOPLE'S GAS LIGHT AND COKE COMPANY,

Defendants.

OPINION

(Filed January 25, 1904.)

William D. Guthrie, for complainant.

Granville W. Browning and *Edgar Bronson Tolman*, corporation counsel, for the City of Chicago.

GROSSCUP, Circuit Judge:

The bill is by a citizen of California, a stockholder of the People's Gas Light and Coke Company, suing in behalf of himself and all other stockholders of the company similarly situated, against the City of Chicago and the Gas Company, citizens of Illinois. The object of the bill is to restrain the city from enforcing an ordinance passed by the City Council of Chicago, October 15th, 1900, forbidding manufacturers of gas from demanding or collecting from consumers of gas within the city more than seventy-five cents per thousand cubic feet, and attaching a penalty of from twenty-five to two hundred dollars to each violation thereof. The bill charges that the ordinance is invalid, first, because the City Council had no power from the State to regulate gas rates, and, secondly, because the ordinance impairs

the obligation of an alleged contract embodied in the special charter of the People's Company by act of the legislature February 7th, 1865.

Relief in equity is asked on the ground of prevention of multiplicity of suits and because there is no adequate remedy at law to protect the company's rights in the premises.

Prior to the commencement of this suit, another suit had been instituted by the People's Gas Light and Coke Company against the City of Chicago, based upon the ordinance in question, charging, first, that such ordinance was beyond the City Council's delegated powers, and, secondly, if enforced, would impair the company's contract rights under its charter, and asked the same character of relief. That suit went to final hearing on demurrer to the bill, resulting in a decree dismissing the bill upon the merits, as to the alleged contract right, but without prejudice to any other suit in respect to the question of the city's power to regulate rates; and an appeal from this decree by the company is now pending in the Supreme Court of the United States.

In that case, I held that the gas company obtained no immunity in its charter from the right of the State, in the exercise of its general powers, to reasonably regulate the rates at which gas should be manufactured and sold. Thus holding, the jurisdiction of the court failed, for the case no longer could be said to arise under the Constitution and laws of the United States. On that account, I expressly declined to pass on the question whether the City Council had power delegated to it from the State to regulate rates; holding that such

question was not before the court. But in the suit now under consideration, that question is brought directly in point.

The right of Mills, a stockholder, to maintain this bill on the state of facts here existing, is challenged. Though it lies at the threshold of the case, I will pass that question until the main question, the power of the City of Chicago to regulate rates of gas, is disposed of.

Has the city the power by ordinance to regulate the rates of gas supply? A municipal corporation possesses only such power as is granted by the legislature in express words, or such as is fairly implied from power expressly granted, or is essential to the specific object and purposes of municipal existence. No one has pretended that the regulation of the price of gas is essential to the specific object for which the City of Chicago was created; hence that source of possible power may be dismissed without further discussion.

The chief argument of counsel for the city is, that the power is to be found in the statute of Illinois, known as the City and Village Act, and their finger is laid on the eleventh, thirteenth and sixty-sixth sections as the clauses containing the grant. These sections are as follows:

> "The City Council in cities and president and board of trustees in villages shall have the following powers: . . .
>
> "*Eleventh.*—To provide for the lighting of the same [streets]."
>
> "*Thirteenth*—To regulate the openings therein [in streets] for the laying of gas or water mains and pipes and the building and repairing of sewers, tunnels and drains and erecting gas lights: *provided, however*, that any company heretofore

organized under the general laws of this state or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages or the inhabitants thereof, with the same, shall have the right, by consent of the Common Council (subject to existing rights), to erect gas factories and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

"*Sixty-sixth.*—To regulate the police of the city or village and pass and enforce all necessary police ordinances."

It is plain to me that the sixty-sixth section, while granting power to regulate the police of the city or village, cannot be enlarged to include power to regulate the prices of gas. The power delegated by the state to the city is not the police power of the state. To so construe it would be to invest the city with nearly all the powers of the state—make the city practically a state by itself. Such manifestly was not the purpose of the section. The section looked, not to the police power of the state in its wide constitutional sense, but to a police in the sense of a local constabulary.

The eleventh section contains no such grant as is claimed. Its purpose is to provide merely for the lighting of streets. Power to light streets and power to regulate the prices at which a manufacturer shall furnish his commodity to the city and the people living within the city, are generally so distinct that no discussion need ensue.

The chief claim of the city is based on the thirteenth section. The section reads as follows:

"*Thirteenth.*—To regulate the openings therein [in streets] for the laying of gas or water mains and

pipes, and the building and repairing of sewers, tunnels and drains and erecting gas lights: *provided, however*, that any company heretofore organized under the general laws of this state or any association of persons organized or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right by consent of the Common Council (subject to existing rights) to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

Read as an entirety, the section clearly grants no general power to regulate rates. Thus treated, the last clause, "subject to such regulations as any such city or village may by ordinance impose," relates back to, and is limited by, the opening clause, which is taken up solely in the regulation of openings in streets for the laying of gas and water pipes. But the court is asked, first to divorce the proviso from the balance of the section so that the proviso may stand as a section apart, and then to interpret the concluding clause as if the word "regulations" was meant to include the rates at which gas should be manufactured and sold, as well as the manner in which the gas factories should be erected and the pipes laid.

I do not feel myself at liberty to close my eyes on the proviso. Presumably it was meant to be read in connection with the whole section, but if I did, it would be unavailing. The context shows that the last clause was not intended to confer upon the City Council plenary power to regulate rates, as well as the manner in which gas factories should be erected and pipes laid down. The mere laying of gas pipes and the installa-

tion of gas plants, together with their repair, are the subject matter of a power widely separable in circumstance and in substance from the power to deal with the rates at which gas shall be manufactured and sold. The first belongs naturally to the city whose streets are to be occupied, for it is related intimately with the supervision of streets; the latter with equal reason, is foreign naturally to the city, for the city is one of the parties in interest; and power to regulate prices ought not in the usual course of affairs to go to a party interested. Until there is legislation more unmistakable than the language used in this section, to indicate a purpose to grant the city power to fix rates, I shall not hold that such was the legislative intent. Unquestionably, the power resides somewhere in the state, but until consciously delegated to some other body, it remains in the state's general repository of power, the general assembly of the state. I may add that in this interpretation I am but following the opinions of Mr. Francis Adams, Mr. Wm. G. Beale, Mr. C. S. Darrow, and Mr. John W. Green, rendered by them severally as corporation counsel, as also what I take to be the opinion of Mr. Walker during his incumbency of that office.

This brings me, then, to the question of jurisdiction. The first point urged is that a court of equity is without jurisdiction to restrain the enforcement of the invalid ordinance. To this I cannot consent. The Gas Company has more than three hundred thousand consumers. An attempted enforcement of its rates by suits at law in the face of this invalid ordinance might lead to three hundred thousand such suits. An attempted enforcement of its rights by cutting off the gas might

lead to three hundred thousand prosecutions. Under what circumstances, it might be asked, would equity take jurisdiction to avoid a multiplicity of suits if the present were not such a case.

The second point urged is that the jurisdiction of the court as a federal court fails, because, in a proper alignment of parties according to their interest, the Gas Company should be grouped with the complainant, and on such grouping, diversity of citizenship between both complainants and the defendant would disappear. It is sufficient to say that in the recent case of *New Albany Waterworks* v. *Louisville Banking Co.*, 122 Fed. Rep. 776, the Circuit Court of Appeals for this circuit sustained federal jurisdiction in a case analogous in all material respects to the one under consideration.

The third point is that the suit is collusive in this, that it is apparent that the Gas Company has refused to bring a suit in its own name in the state courts to which it was relegated, solely that this complainant might obtain a footing in the federal court. This may or may not be the true explanation of the company's inaction. In the present state of the record, it cannot be treated as the explanation. The bill avers that Mills demanded of the company that it bring such suit, and that such demand was refused; and this, on the face of the record, is admitted by the demurrer. When the city raises the question by proper pleading or points to some fact in the record that would authorize the court to act *sua sponte*, it will be time to inquire whether collusion in fact exists.

The fourth point against jurisdiction is the one on which greatest stress is laid. In the suit previously

heard here, pending now on appeal by the Gas Company in the Supreme Court, the Gas Company challenged the validity of the ordinance both because it was said to impair the company's contract right under its charter and because the City Council was without power delegated to it by the State to regulate the prices of gas. The Court held in that case that no charter contract as claimed existed, and so holding declined to hear or pass upon the question of delegated authority, for the reason that the cause came into the federal court solely as one arising under the Constitution and laws of the United States. Wherefore, the ground of federal jurisdiction failing, the other question involved—solely one of state law—must go out of court also, though without prejudice to a new suit in the proper forum.

I think under such circumstances it to be unquestioned that had there been no appeal, and had the company refused to bring a new suit in the appropriate tribunal, a suit such as this would lie at the instance of a stockholder. But the insistence of counsel is that the appeal by the Gas Company to the Supreme Court on both grounds shows that the company is still seeking, in the Supreme Court of the United States, to invalidate the ordinance as one not delegated under the laws of Illinois to the City Council, and in so doing meets fully its duty in the premises to its stockholders. The trouble is that such appeal does not fully meet the measure of the company's duty. The suit pending on appeal will not bring a judgment touching the power of the City Council, if the impairment of contract question be determined against the company. This court has so

held, and there is no reason to believe that the Supreme Court will hold otherwise. At any rate, until it is held otherwise, the former holding remains the law of the case.

But if the company has taken no measure conformable to law to prevent the wrong threatened, the right of the stockholder to take such measures cannot be disputed, and a measure conformable to law is to be tested, not by the company's opinion of the law, but by the law itself. The stockholder is entitled to the law, not to a mistaken view of the law; to an action that will lie, not to an action that must be dismissed for want of jurisdiction in the court resorted to.

The demurrer will be overruled and an injunction entered as prayed for in the bill.